
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant
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INSOLVENCY UPDATE

Which company was the employer?

C & T Grinter Transport Services Pty Ltd (In Liquidation) & Grinter Transport Pty Ltd (In Liquidation) required the Federal Court of Australia to consider which of three companies in a group was the employer of staff. The answer to that question could determine whether the employees received their entitlements in full or only a nominal dividend.

The operators of a successful family transport business purchased a competitor. The original plan was that all staff would be transferred to a new company, incorporated for the purpose of owning the merged business. This was reflected in the contract for sale and purchase.

However, the managing director explained that the company's accountant had advised that workers' compensation insurance premiums would increase significantly as a new employer. For that reason, it was apparently then decided to continue with the employment of staff in the original family company.

The Court spent some time reviewing the adequacy of documentation of the employment relationship.

Employment declarations for the Australian Taxation Office showed the original family company as the employer. However, the declarations were typically signed by employees whilst blank and completed later.

Pay slips described the original company as the employer and the payroll was funded by transfers from a bank account in the name of the original company. The workers' compensation policy was in the name of the original company, as were the business activity statements.

The Court determined that:

- it was well established that a transfer of employment could not occur without employees' consent. In the absence of any evidence of such consent, the existing employees must be taken to have maintained their employment as employees of the original family company;
- the identity of the employer of the staff of the acquired business appeared to be a matter of indifference to the employees involved. However, it appeared that the documentation available

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reflected the intention that those staff were also to be employed by the original company;

- it appeared that new staff hired after the acquisition date were also employed by the original company;
- the effect of the determinations was that the employees were held to be employed by an assetless company; and,
- the Court was very concerned about the paucity of evidence from the employees, explained by the respective Liquidators as reflecting a lack of co-operation, by the employees.

However, as the employees had not been joined as parties to the action, the Court took comfort from the fact that outcome would not be determinative of their rights and so the employees would not be bound by the decision.

Since September 2001 the Commonwealth's General Employee Entitlement Redundancy Scheme has been of assistance for employees in such circumstances.

Court refuses stay to minimise a Trustee in Bankruptcy's costs

A bankrupt requested the Federal Magistrates Court of Australia to review the conduct of her Trustee and to order the annulment of her bankruptcy. The Trustee asked the Court to Order that the bankrupt vacate her real estate property and surrender possession of the property to the Trustee. The bankrupt's application was dismissed.

In *Teese v Woodgate* the bankrupt asked the Court to freeze the operation of the Orders until an appeal could be heard.

The Court observed that the position reflected the regrettably common situation in which an obsession with injustice, real or imagined of creditors and an inability to adjust to the practical realities leads to bankruptcy and the estate being dissipated in fruitless legal proceedings.

In the absence of any evidence that suggested that the bankrupt was likely to succeed in her appeal and primarily with a concern to avoiding further dissipation of the estate, the Court refused to stay the Orders.

Deadlocked directors I

Alu-Tech Shopfitters Pty Ltd; Dare v Keegan concerned a dispute between directors.

Five former colleagues founded a shopfitting business of their own in 1994, each owning shares and acting as a director. Over the next five years, three of the founders left the business, selling their shares to the remaining shareholders. By 1999 there were only two directors, each director holding an equal number of shares.

In 2003, one of the directors commenced legal proceedings in an attempt to resolve a management deadlock. The director asked the Supreme Court of Victoria to require the other director to sell his shares at a price to be fixed by the Court, or alternatively, to wind up the company.

The director noted the failure to hold directors' meetings between 1999 and 2003 was evidence of a badly strained

relationship. He also claimed that the other director consistently underquoted and therefore, the business accepted unprofitable contracts.

The second director agreed that their relationship was strained but disputed the claims of unprofitable tendering. The second director claimed that some unprofitable contracts had been accepted deliberately in order to keep the factory busy and claimed that others had become unprofitable due to poor management by the first director.

No doubt aware of the risk to the value of the business, which employed 10 staff and recorded sales of more than \$2 million, the Court directed the directors to engage in mediation.

When the mediation failed, the directors attempted to negotiate a sale of shares between the two of them. However, the older director would not purchase younger director's shares unless the younger would agree to a restraint of trade. The younger could not afford the price sought by the older director. When those negotiations foundered, the Court attempted to avert a winding up of the company by appointing an agent to seek offers for the purchase of the business. However, without contractual restraints of trade the agent was unable to find a purchaser for the business, and the Court was obliged to again consider the winding up of the company.

After diligently exploring all practical alternatives, the Court reluctantly Ordered the winding up of the company.

Deadlocked directors II

Sherred v McDonald dealt with questions about the validity of the appointment of Administrators to a

company.

Following a dispute between the two directors of a company, one director resigned on 6 September 2003. The other director resigned on 4 December 2003. On the same day, in circumstances held by the Court to be not altogether clear albeit not particularly relevant, a single new director was appointed.

The new director attempted to resolve the dispute between the two former directors. After determining that this was impossible, on 10 June 2004 he purported to resign and re-appoint the two former directors. One of those directors then purported to act as sole director to appoint Administrators to the company.

In considering whether the appointment of the Administrators was valid the Supreme Court of Queensland held that:

- the appointments of the directors on 4 December 2003 and 10 June 2004 had not been effected as required by the company's constitution;
- the purported appointment of the Administrators by the single but not sole director was invalid; and,
- in light of evidence that the Administrators had been made aware of the irregularities of their appointment on the day after it was made, the Court was not prepared to allow the Administrators their costs and outlays without the benefit of further evidence.

It is our experience that many small and medium sized companies incorporated before 9 December 1995 are operating as single director companies but have not amended their memorandum and articles of association to reflect this.

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